BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
	)	
COMPLAINANT	)	
	)	
v.	)	**PROCEEDING NO. 18F-0866E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.'S MOTION TO DISMISS FORMAL COMPLAINT

Tri-State Generation and Transmission Association, Inc. ("Tri-State"), by its attorneys and pursuant to Colorado Public Utilities Commission (the "Commission") Rules 1308 and 1400, moves to dismiss the Formal Complaint (the "Complaint") filed by Delta-Montrose Electric Association ("DMEA").

RULE 1400 CONFERRAL

Pursuant to Rule 1400(a)(I), no conferral is required for this motion.

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INTRODUCTION

Through its Complaint, DMEA solicits the Commission's participation in a scheme to cast aside the wholesale power purchase contract DMEA signed with Tri-State some 18 years ago. After reaping the benefits of the contract for many years, DMEA finds it to be inconvenient—because cheaper prices are now available elsewhere. DMEA, therefore, asks the Commission to determine the current value of its long-term contract with Tri-State, which Tri-State's bylaws require be satisfied before any Tri-State member may withdraw.

DMEA is a party to Tri-State's bylaws, under which DMEA's proposed withdrawal from Tri-State is committed to the discretion of Tri-State's Board of Directors. Under Colorado law, the bylaws are a contract between and among DMEA, Tri-State, and Tri-State's 42 other member systems. To grant the relief DMEA requests, the Commission must not only nullify Tri-State's bylaws and force the renegotiation of DMEA's power purchase contract over Tri-State's objection, it must also adjudicate breach of contract claims involving the bylaws, the purchase contract and various other contracts between Tri-State and DMEA. Respectfully, the Commission lacks authority to do any of these things.

Even if it has legal authority to grant DMEA's requested relief (which it does not), the Commission should decline to do so. For over 60 years, the Commission has respected the limitations on its jurisdiction over Tri-State's generation and transmission business. Granting the relief DMEA requests would require the Commission to supplant Tri-State's corporate governance, substituting the Commission's judgment for that of the Tri-State Board of Directors on the most

sensitive of issues: who will and who will not be Tri-State's member-owners and part of its cooperative association.

DMEA wants to terminate its wholesale power purchase contract with Tri-State. Its Complaint here is just the latest attempt by a rural electric cooperative to avoid important contractual commitments it has made and upon which others have relied. In a long line of cases, state and federal courts have uniformly rejected these attempts, as the Commission should do here. DMEA will undoubtedly claim that it does not propose to evade its contract, and that it only wants the Commission to set a "reasonable" and "fair" amount DMEA must pay to escape. That is a semantic quibble. DMEA wants out of its contract at a bargain basement price. If the Commission allows that, the resulting harm to Tri-State and its remaining members will be different than if DMEA abandoned the contract entirely, but only in degree.

PROCEDURAL BACKGROUND

The procedural background for this proceeding is set forth in the Commission's Interim Decision issued December 28, 2018. Decision No. C18-1177-I, ¶¶ 1-2, 15-17. This motion is timely under the Interim Decision.

FACTUAL BACKGROUND

I. Tri-State Is Fundamentally Different from an Investor-Owned Utility.

Tri-State is a not-for-profit generation and transmission cooperative corporation ("G&T") owned by 43 not-for-profit rural distribution cooperative electric associations and public power districts ("Members") in Colorado, Nebraska, New

Mexico and Wyoming.[1] Tri-State's business is carried out "for the mutual benefit of all the members." § 7-55-101(1)(b), C.R.S. (emphasis added).

Tri-State is a wholesale electric supplier—an aggregator of the Members' loads. It is owned by the Members, not shareholders, and Tri-State does not seek to generate a profit for outside investors. Unlike an investor-owned utility or a distribution cooperative, Tri-State has no retail customers or exclusive service territory. Instead, Tri-State buys and generates electric power, and transmits, delivers and sells it to the Members. The Members, in turn, distribute and resell the electricity they purchase at wholesale from Tri-State to their own member-customers.

Tri-State's wholesale rates, service, and other business matters are governed by a 43-member, democratically elected Board of Directors (the "Board"), with one director elected by each Member. Board members live in the rural areas the Members serve. Tri-State's Board is directly accountable to the Members; the Members, in turn, are directly accountable to their own member-consumers.

Tri-State facilitates the generation and transmission of electricity across a four state, 200,000-square-mile area. Members serve customers in 56 Colorado counties, 20 western Nebraska counties, 28 New Mexico counties, and 14 counties in central and northern Wyoming.[2]

A. The Rural Electrification Act.

Congress passed the Rural Electrification Act, 7 U.S.C. § 901, *et seq.* ("the RE Act") in 1936. At that time, 90 percent of rural America lacked electric power.

[1] *See* https://www.tristategt.org/content/member-list.

[2] *See* https://www.tristategt.org/content/members-service-territories.

Fuchs v. Rural Electric Convenience Cooperative, Inc., 858 F.2d 1210, 1212 n.8 (7th Cir. 1988). Congress "was concerned with the fact that those then engaged in the business of generating electrical energy had failed to extend electric service to the rural communities of America and determined that the national interest would be served by subsidizing the rural user of electricity." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc*., 874 F.2d 1346, 1348 (10th Cir. 1989) ("*Shoshone II*"). Congress therefore sought "'to provide electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service.'" *Fuchs*, 858 F.2d at 1212 n.8, quoting *Salt River Project Agric. Improvement & Power Dist. v. Fed. Power Comm'n,* 391 F.2d 470, 473 (D.C. Cir. 1968).

The RE Act allowed DMEA and other rural electric distribution cooperatives to receive government-subsidized loans and deliver electricity to rural consumers. By the mid-1960s, nearly 1,000 rural electric distribution cooperatives had been formed. *Caver v. Central Alabama Electric Cooperative*, 845 F.3d 1135, 1138-39 (11th Cir. 2017); *Salt River*, 391 F.2d at 472. These cooperatives, in turn, banded together to form G&Ts such as Tri-State in order to secure for themselves long-term, reliable sources of electricity. "Getting electric power out to the rural communities was obviously an expensive task . . . and formation of central G&Ts made it possible for rural communities to obtain the needed help and financial aid." *Shoshone II*, 874 F.2d at 1349.

B. Tri-State's All-Requirements Contracts with its Members Are Essential to its Existence.

The G&Ts' viability depends upon the existence and enforceability of all requirements wholesale electric service contracts ("WESCs") with their members. In Tri-State's case, each Member has entered into a long-term WESC that requires the Member to purchase at least 95% of its electricity requirements from Tri-State over a period of many decades. **Attachment A** at 2-11, ¶ 1.[3]

To minimize the Members' wholesale electricity cost, Tri-State relies upon debt financing as a principal source of capital. As of December 31, 2017, for example, Tri-State's debt totaled approximately $3.3 billion.[4] **Attachment B** at 2. The Member WESCs allow Tri-State to secure these loans at favorable interest rates. All revenue Tri-State receives under the WESCs is pledged to Tri-State's lenders, providing valuable collateral and reducing Tri-State's credit risk as a borrower.[5] The WESCs are therefore "an essential factor to the cohesiveness and financial strength of the G&T systems" because they "place the financial strength of the distribution cooperatives behind G&T loans." *Shoshone II*, 874 F.2d at 1349-50;

[3] The WESC attached as **Attachment A** is the contract between Tri-State and DMEA (the "DMEA WESC"). There is no material difference between the DMEA WESC and those signed by the other Members, other than their duration. The DMEA WESC extends through 2040, while the other Members' WESCs extend through 2050.

[4] This does not include "off balance sheet" obligations, such as payments required under long term leases.

[5] "Rather than having to build its equity, a G&T is able to operate on a very small margin, thereby passing the savings on to its members. Normally, a highly leveraged company is a credit risk and must pay premium interest rates, if it is able to borrow at all. Because all-requirements contracts allow the REA and the financial market to view G&Ts and their member distribution cooperatives as an integrated whole, reasonable and necessary financing can be made available to G&Ts despite the small equity margin." *Shoshone II*, 874 F.2d at 1350 n.3.

see also Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, 805 F.2d 351, 353 (10th Cir. 1986) ("*Shoshone I*").[6]

Although DMEA's is only one of 43 WESCs, it is important to Tri-State, Tri-State's lenders, and the other 42 Members. That is because "[t]he withdrawal of any distribution co-op from the system necessarily shifts the fixed costs of the electricity (represented by the debt service) to the other members . . . and raises the possibility of default, with potentially disastrous results for the system." *Fuchs*, 858 F.2d at 1212-13 n.8, (citing *Shoshone I*, 805 F.2d at 357); *Jay County Rural Electric Membership Corporation v. Wabash Valley Power Association, Inc.*, 692 N.E.2d 905, 913 (Ind. App. 1998)(a G&T's business is based upon the continuance of the member WESCs "throughout the agreed upon term"). If DMEA or any other Member is able to avoid its all requirements purchase obligation throughout the contract term, "Tri-State's other members—as well as those who purchase power from such members—will be forced to pay higher electric power bills . . . ." *Shoshone I*, 805 F.2d at 357; *see also Jay County*, 692 N.E.2d at 913-14 (termination of one member's contract "has a negative effect on the remaining members who will have to bear the increase in their costs occasioned by the termination.").

C. DMEA'S Wholesale Electric Contracts with Colorado-Ute and Tri-State.

DMEA originally was a member of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"). As of 1992, DMEA and Colorado-Ute's other members had signed WESCs requiring them to purchase their electricity from Colorado-Ute through

[6] Tri-State's public ratings from the three principal credit rating agencies (S&P, Moody's and Fitch) can be found at https://www.tristategt.org/content/credit-ratings.

December 31, 2025. *In re Colorado-Ute Electric Ass'n, Inc.*, 120 B.R. 164, 166 (Bankr. D. Colo. 1990) ("*Colorado Ute*").

Colorado-Ute filed for bankruptcy protection in 1990. *Id.* Through the bankruptcy proceeding, DMEA and Colorado-Ute's other members gained flexibility to acquire their future wholesale power from any available source, including the spot market. Ultimately, four Colorado-Ute members signed long-term purchase contracts with Public Service Company of Colorado. *See* Docket No. 91A-589E, Decision No. C91-1729, 1992 WL 12011022.[7] Colorado-Ute's other members, including DMEA, elected instead to become members of Tri-State and to sign long-term all-requirements WESCs with Tri-State. *Id.*

DMEA signed its first WESC with Tri-State on March 27, 1992. Under this contract, DMEA committed to purchase all its wholesale electric requirements from Tri-State through December 31, 2025. On November 1, 2001, DMEA and Tri-State entered into the contract which remains in force today (the "DMEA WESC").[8] For its part, DMEA agreed to purchase and receive from Tri-State no less than 95% of "all electric capacity and electric energy which [DMEA] shall require for the operation of [DMEA's] system" through December 31, 2040. DMEA also acknowledged that:

- Tri-State had financed and in the future may finance new generation and transmission facilities in whole or in part through loans;
- Tri-State's indebtedness is evidenced by certain notes and secured by certain mortgages on Tri-State's assets, which promissory notes and mortgages would be amended, supplemented or restated from time to time in the future;

[7] **Attachment C.**

[8] The first WESC between DMEA and Tri-State took the form of an amendment to DMEA's existing WESC with Colorado-Ute. (Compl., Attach. J at 1).

- Payments due to Tri-State from DMEA under the contract will be pledged and assigned to Tri-State's creditors to secure Tri-State's loans;

- Tri-State and its lenders were relying on DMEA's contractual power purchase commitment to provide for the development of Tri-State's facilities, the development of a generation and transmission system to serve DMEA, and for Tri-State to undertake a long-term planning and power supply acquisition program; and

- Tri-State's lenders would rely on DMEA's wholesale electric service contract to assure that Tri-State's borrowing would be repaid.

Attachment A at 1-2.

On an annual basis since 1992, DMEA has submitted to Tri-State forecasts of DMEA's electricity requirements through December 31, 2040. (Compl., Attach. J at 2.) Because the DMEA WESC requires Tri-State to satisfy DMEA's wholesale power requirements through the year 2040, Tri-State staff relies upon DMEA's long-term power requirements forecasts to plan, construct and maintain Tri-State's generation and transmission system. *Id.* Based upon the power forecasts of DMEA and other Tri-State Members, Tri-State since 1992 has made large investments in generation and transmission assets and has incurred debt to finance these expenditures. *Id.*[9]

D. Tri-State's Bylaws.

Tri-State's bylaws establish a fixed and ordered process for withdrawal from membership. **Attachment D** at 2. They state that the Board "may," but need not, approve the request by a Member to withdraw from Tri-State. The bylaws do not require the Board to provide a number at which a Member can buy out of its WESC,

[9] See Tri-State's 2017 Annual Report, p. 14, found at https://www.tristate.coop/sites/ts/files/PDF/AnnualReports/TriState-AnnualReport-2017-040318.pdf

even if the Board grants the Member's withdrawal request. Finally, the bylaws give the Board no flexibility to allow a Member to withdraw until the Member has met all of its contractual obligations to Tri-State. Article I, Section 3 of Tri-State's bylaws specifies:

> (a) A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to [Tri-State].
>
> (b) Upon withdrawal, cessation of existence, or expulsion of a member, the membership of such member shall thereupon terminate. Termination of membership in any manner shall not release a member from any debts due this Corporation nor impair the obligations of a member under any contract with this Corporation.
>
> (c) The Board of Directors shall have authority to prescribe equitable terms and conditions to be applied when a member withdraws from membership, ceases existence, or is expelled from membership . . . .[10]

II. Tri-State Member Withdrawals.

Over the past 50 years, Members have from time to time sought to withdraw from Tri-State, each under unique facts and circumstances. The terms and conditions of a Member's withdrawal are of critical importance to the other Members because every dollar a departing Member avoids paying Tri-State under its WESC is a dollar that must be made up by remaining Members.

A. Shoshone

In 1985, Tri-State Member Shoshone River Power, Inc. ("Shoshone") entered into a contract to sell its distribution system to Pacific Power & Light Co. ("Pacific"). At the time, Shoshone had a WESC with Tri-State that extended an additional 35

[10] **Attachment D** at 2 (emphasis supplied).

years. Shoshone informed Tri-State that once it had sold its assets to Pacific, Shoshone would no longer have any wholesale electrical requirements and therefore would stop purchasing power under its WESC. *Shoshone I*, 805 F.2d at 352-54.

Tri-State filed suit to enjoin the asset sale. Ultimately, Shoshone was able to convey its assets to Pacific during a short gap in court-imposed injunctions. Tri-State therefore sued both Shoshone and Pacific for money damages. Tri-State prevailed at trial and in two different appeals. Ultimately, a substantial money damage judgment was entered in favor of Tri-State. *Shoshone II*, 874 F.2d at 1350-51.

B. Sheridan-Johnson

In 1996, Tri-State's Board specified equitable terms and conditions for its Member, Sheridan-Johnson Rural Electrification Association ("Sheridan-Johnson"), to withdraw. To achieve operational efficiencies, Sheridan-Johnson proposed to merge with Tri-County Electric Association ("Tri-County"), a neighboring distribution cooperative that was a member of Basin Electric Power Cooperative ("Basin"), another G&T. Tri-County was to be the surviving entity and would continue to purchase all its electric requirements from Basin. To meet Sheridan-Johnson's contractual obligations under Tri-State's bylaws and make the remaining Tri-State Members financially whole for the loss of Sheridan-Johnson's load, Basin committed to purchase from Tri-State all the electricity Sheridan-Johnson would have purchased from Tri-State during the remaining term of Sheridan-Johnson's WESC. Upon the effective date of the Basin purchase contract, Sheridan-Johnson's WESC with Tri-State was discharged and its membership rights in Tri-State terminated.

C. NPSIG

In April 2009, five Nebraska members (the "NPSIG Members") sought to withdraw from Tri-State. Tri-State's Board established equitable terms and conditions for the NPSIG Members' withdrawal, which included the requirement that the NPSIG Members make the following payments to Tri-State in order to satisfy their contractual obligations under the WESCs:

Chimney Rock Public Power District	$21,285,000
Midwest Electric Cooperative Corporation	$101,028,000
Northwest Rural Public Power District	$33,536,000
Panhandle Rural Electric Membership Association, Inc.	$38,752,000
Roosevelt Public Power District	$25,176,000

Alleging (as DMEA does here) that the amount of the required withdrawal payments were unfair, the NPSIG Members sued Tri-State in federal court—represented by the same attorneys who represent DMEA in this Commission proceeding. Along with seven other claims for relief (all of which the federal court ultimately dismissed), the NPSIG Members asserted that Tri-State had breached Section 3(a) of the bylaws by failing to prescribe "equitable" terms and conditions for the NPSIG Members to withdraw. One NPSIG Member abandoned its lawsuit, but the other four pursued their claims to judgment. Based upon a jury verdict in Tri-State's favor, the court dismissed NPSIG's lawsuit, finding that Tri-State had not breached section 3(a) of the bylaws. *See* Final Judgment in *Chimney Rock Public Power District v. Tri-State Generation and Transmission Ass'n., Inc.*, Civil Action No. 10-cv-02349-WJM-KMT (D. Colo. June 14, 2014). After their lawsuit was dismissed, the NPSIG Members abandoned their attempt to withdraw from Tri-State, have honored their WESCs, and remain Members today.

D. Kit Carson.

In 2014, Kit Carson Electric Cooperative ("KCEC") expressed its desire to withdraw from Tri-State and asked Tri-State for a buyout number that would satisfy its WESC and other obligations to Tri-State. Per the Board's direction, Tri-State staff negotiated a buyout number for Kit Carson. Ultimately, staff for KCEC and Tri-State reached agreement on the terms and conditions under which KCEC could withdraw from Tri-State subject to the approval of their respective Boards. The Tri-State Board approved those terms and conditions in June 2016. (Compl., Attach. J at 5.)

III. DMEA'S Proposed Withdrawal from Tri-State.

On October 27, 2016, DMEA's board authorized its staff to initiate a potential withdrawal from Tri-State and, separately, "an early termination of the Tri-State electric contract by requesting an exit cost calculation." *See* **Attachment E** (January 24, 2017, DMEA Board Resolution). Tri-State staff subsequently computed a preliminary buyout number for DMEA, but at no point did the Board consent to or approve DMEA's withdrawal under the bylaws. During the course of negotiations, Tri-State staff provided DMEA with all information concerning Tri-State's WESC buyout calculations, including the buyout numbers themselves and key variables used in the mark-to-market ("MTM")[11] calculation approved by the Board such as: the amount of revenue assumed to be lost each year (demand and energy; the amount of market revenue received (dollars per megawatt hour per year); credit for avoided transmission costs, including Tri-State's assumed Open Access

[11] MTM is a valuation methodology that captures the fair market value of assets and liabilities that can change over time. MTM uses Tri-State's Long Term Financial Forecast for Tri-State's Class A Member Rate through the remaining term of the departing Member's contract term, and it estimates the market price of wholesale power during that same period using external market data.

Transmission Tariff; credit for capital credits; credit for benefits to Tri-State from re-dispatch of power; book value of stranded transmission; and the discount and inflation rates used in Tri-State's computation. DMEA and Tri-State staff then engaged in preliminary discussions about an amount of money DMEA might pay to Tri-State in exchange for being released from further obligations under its WESC. Although the negotiations never concluded, DMEA filed a complaint under Tri-State's Board Policy 316 ("BP 316"), Tri-State's "Non-Rate Dispute Resolution Policy." (Compl., Attach. J at 5-6.)[12]

After receiving extensive written and oral submissions by DMEA and Tri-State's staff, Tri-State's Board denied DMEA's BP 316 complaint, but directed Tri-State staff to engage in further negotiations with DMEA. (Compl., Attach. J.) The Board noted that DMEA can withdraw as a Member while continuing to honor its WESC, reasoning that "this would avoid any reallocation of the financial risk to which the parties agreed when the contract was signed." *Id.* at 8. Noting that any payment by DMEA to extinguish its obligations under the DMEA WESC would "inevitably be based upon assumptions that are to some extent speculative," the Board directed its staff as follows (*id.*):

> [T]he Board directs Tri-State staff to recommend equitable terms and conditions under which DMEA may withdraw as a member of Tri-State. Such terms and conditions should allow DMEA to withdraw from membership while continuing to honor its wholesale electric service contract with Tri-State. Staff may (but need not) alternatively provide for a buyout and a

[12] DMEA asserts that the Commission has jurisdiction over its Complaint because the amount it must pay to discharge its WESC is a "rate." (Compl. ¶ 53.) That assertion is contradicted by DMEA's filing of a complaint alleging the same facts as alleged here under Tri-State's Board Policy 316, Tri-State's Non-Rate Dispute Resolution Policy.

> complete discharge of DMEA's wholesale electric service contract. If Tri-State staff does recommend a buyout of DMEA's contract, assumptions upon which the buyout number are based should be equitable while resolving all reasonable doubts in a manner designed to protect the financial interests of remaining Tri-State members.

In accordance with the Board's instructions, Tri-State's Chief Executive Officer wrote to his counterpart at DMEA, proposing a meeting to continue the withdrawal negotiations. Tri-State's CEO expressed his willingness "to discuss withdrawal terms with and without a contract buyout." (Compl., Attach. M.) In response, representatives of Tri-State and DMEA agreed to meet on December 11, 2018, to continue the withdrawal discussions. **Attachment F.** Instead of continuing to negotiate as the parties had agreed, DMEA canceled the meeting and filed its Complaint with the Commission.

LEGAL STANDARD

Commission Rule 1308(e) authorizes a motion to dismiss based on, *inter alia*, lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and insufficiency of signatures. "Subject matter jurisdiction concerns [the Commission's] authority to deal with the class of cases in which it renders judgment." *In the Matter of Water Rights*, 361 P.3d 392, 395 (Colo. 2015).[13] "In considering a motion to dismiss for lack of subject matter jurisdiction, . . . [the Commission] examines the substance of the claims based on the facts alleged and

[13] If not otherwise inconsistent with its enabling statutes or own procedural rules, the Commission may seek guidance from or employ the Colorado Rules of Civil Procedure. *See* Commission Rule 1001. In the state courts, challenges for lack of subject matter jurisdiction are governed by Colo. R. Civ. P. 12(b)(1). Because the Colorado and federal rules are identical, case law interpreting the state and federal rules are instructive in this proceeding. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993) (Colorado courts look to federal case law interpreting Rule 12(b)(1)).

the relief requested." *West Colorado Motors, LLC v. General Motors, LLC*, 411 P.2d 1068, 1078 (Colo. App. 2016). The Commission must determine its jurisdiction as a threshold matter. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998).

DMEA has the burden of proving jurisdiction and the Commission need not treat the facts alleged in the Complaint as true. *City of Boulder v. Public Service Co. of Colo.*, 40 P.3d 289, 293 (Colo. 2018); *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). In fact, the jurisdictional allegations in DMEA's Complaint "have no presumptive truthfulness, and the [Commission] has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Medina*, 35 P.3d at 452.

ARGUMENT

I. The Commission Lacks Subject Matter Jurisdiction Over the Complaint Because It Is Not Empowered to Adjudicate a Contract Dispute Concerning Tri-State's Bylaws.

The withdrawal of DMEA or any other Member from Tri-State is governed by Article I, Section 3 of Tri-State's bylaws. The bylaws constitute a contract between Tri-State and all 43 of its Members. As explained below, DMEA's Complaint asks the Commission to (a) adjudicate a contract dispute between DMEA, Tri-State and the 42 other Members; (b) nullify a key provision of Tri-State's bylaws; and (c) require DMEA's WESC to be renegotiated and extinguished over the objection of Tri-State. The Commission lacks jurisdiction to do any of these things.

A. Tri-State's Bylaws Are a Contract Between Tri-State and the 43 Members, and DMEA's Claim, if any, is one for Breach of the Bylaws.

Article I, Section 3(a) of Tri-State's bylaws ("Section 3(a)") specifies the only way a Member can withdraw from Tri-State. Under Section 3(a), a Member may withdraw "upon compliance with such equitable terms and conditions as [Tri-State's] Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to [Tri-State]."

Under Colorado law, a "provision in the bylaws is a contract between the corporation and its shareholders and among the shareholders. . . ." *Paulek v. Isgar*, 551 P.2d 213, 215 (Colo. App. 1976). *See also P.F.P. Holdings, L.P. v. Stan Lee Media, Inc.,* 252 P.3d 1, 3 (Colo. App. 2010) ("A corporation's bylaws constitute a contract between the corporate entity and its shareholders."). If DMEA believes Tri-State has acted in contravention of the bylaws (for example, by failing to prescribe "equitable terms and conditions" for DMEA's withdrawal), DMEA's remedy is a lawsuit for breach of contract, filed in a court of competent jurisdiction.

Of this, DMEA and its attorneys are well aware. In 2009, the five NPSIG Members sought to withdraw from Tri-State so they could purchase their wholesale power elsewhere, at lower prices. Pursuant to Section 3(a), they asked Tri-State's Board to establish equitable terms and conditions for their withdrawal. To make the other Members whole for the extinguishment of the NPSIG Members' WESCs, the Board required the NPSIG members to make withdrawal payments totaling $220 million. *See supra* at 11-12. Represented by the same attorneys who drafted and filed DMEA's Complaint here, the NPSIG Members sued Tri-State, asserting a breach of contract claim under the bylaws. *Id.; see also Chimney Rock Public*

Power District v. Tri-State, 2014 WL 1583993, at *2 (D.Colo. April 21, 2014) ("Plaintiffs' only remaining claim in this action alleges that Defendant breached its contract with Plaintiffs by failing to comply with its bylaws requiring it to establish equitable terms and conditions to allow Plaintiffs to withdraw."). A federal court jury found that Tri-State had not breached the bylaws and the NPSIG Members' lawsuit was dismissed. **Attachment G** (verdict form).

B. The Commission Lacks Jurisdiction to Adjudicate Breach of Contract Claims

The Commission is not a court of general jurisdiction and its authority does not extend to the adjudication of contract disputes. *Public Utilities Commission v. Manley*, 60 P.2d 913 (Colo. 1936) (PUC's statutory authority not that of an article III court)*; People v. Swena*, 296 P. 271, 272 (Colo. 1931) ("The Public Utilities Commission is not a court."); Proceeding No. 13F-0110EG, Decision No. R14-0369 ¶¶ 34-35 (breach of contract claim is outside the Commission's jurisdiction, even where a party to the contract is a public utility), *exceptions denied*, C14-0530. *See also General Cable Corp. v. Citizens Utilities Co.,* 555 P.2d 350, 354-55 (Ariz. App. 1976) (resolving dispute concerning a "take or pay" contract under Arizona law and observing that "the construction and interpretation to be given to legal rights under a contract reside solely with the courts and not with the Corporation Commission"); *Williams Elec. Co-op., Inc. v Montana-Dakota Utilities Co.*, 79 N.W.2d 508, 517 (1956) (North Dakota Public Service Commission does not "compel the enforcement of contractual obligations.").

The Commission's primary function is to regulate rates charged by public utilities for services provided in Colorado. *See* Colorado Constitution, Art. XXV; §

40-3-102, C.R.S. This power is "legislative." *CF&I Steel v. Public Utilities Comm'n*, 949 P.2d 577, 584 (Colo. 1997). If the Commission grants DMEA the relief it requests, it must interpret Tri-State's bylaws and determine whether they have been breached. Separately, the Commission must evaluate the DMEA WESC and calculate an amount that will make Tri-State, the non-terminating party, whole. Adjudicating a dispute between parties to a contract is not a "legislative" function, nor is forcing the termination of a contract over the objection of a party.

C. Tri-State's Bylaws Establish an Ordered Process for Member Withdrawal, a Process the Commission Should not Disrupt.

Section 3(a)—to which DMEA agreed[14]—states:

> A member **may** withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors **may** prescribe provided, however, that **no** member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation. (Emphasis added)

1. The Bylaws Do Not Give DMEA the Right to Withdraw.

Section 3(a) identifies actions Tri-State's Board "may" take upon receipt of a withdrawal request and also identifies a condition a Member "shall" meet for withdrawal. The use of the permissive "may" in conjunction with the mandatory "shall" demonstrates the Members' intent to establish two different conditions related to a withdrawal request—one that gives Tri-State's Board discretion to permit withdrawal, but *only* if all of the Member's contractual obligations to Tri-State have been satisfied.[15]

[14] When DMEA joined Tri-State in 1992, the bylaws were amended and DMEA was given a chance to vote on their adoption. Tri-State's bylaws, as amended in April 2016, are substantially similar. Bylaws, Art. I, § 3.

[15] *Cf. People v. Garcia*, 382 P.3d 1258, 1261 (Colo. 2016) ("[w]here both mandatory and directory verbs are used in the same statute, it is a fair inference that the legislature realized the difference in

In exercising its discretion as to whether to allow a Member such as DMEA to withdraw, Tri-State's Board must consider factors entirely unrelated to the amount of any WESC buyout. Such considerations include the impact a Member's withdrawal might have on the remaining Members, the relative financial strength of the Tri-State system with one fewer Member, whether and how the Member's withdrawal might implicate Tri-State's debt covenants and credit rating, etc. Tri-State's Board, composed of one representative from each Member, is uniquely suited to consider these factors.

The final clause of Section 3(a) directs that "no member shall be permitted to withdraw until it has met all its contractual obligations" to Tri-State. This mandatory language further confirms that a Member has no affirmative right to withdraw. In addressing a dispute between a G&T and distribution cooperative and analyzing withdrawal language nearly identical to Section 3(a), the Montana Supreme Court held that the withdrawal bylaw "clearly gives the board of trustees the right to set reasonable conditions; and, more than that, no right where contractual obligations have not been met." *Upper Missouri G & T Elec. Coop., Inc. v. McCone Elec. Co-op, Inc.*, 484 P.2d 741, 746 (Mont. 1971) (emphasis added).[16]

It is undisputed that DMEA has not "met all its contractual obligations to [Tri-State]." DMEA concedes that it is a party to the DMEA WESC, which will not expire for an additional 22 years. (Compl. ¶ 4.) Aside from the DMEA WESC and Tri-

meaning, and intended that the verbs should carry with them their ordinary meanings. This inference strengthens where 'shall' and 'may' are used in close juxtaposition.") (internal quotation marks and alterations omitted).

[16] Similar to Article I, Section 3(a) of Tri-State's bylaws, the G&T's bylaws in *McCone* stated that "[a] member may withdraw from membership upon compliance with such equitable terms and conditions as the board of trustees may prescribe, provided, however, that no member shall be permitted to withdraw until he has met all of its or his contractual obligations to the Federation." 484 P.2d at 746.

State's bylaws, there are other sources of DMEA's ongoing "contractual obligations to [Tri-State]." Tri-State and DMEA are parties to a variety of other contracts that govern their business relationship and DMEA's membership in Tri-State. *See* **Attachment H** (list of presently pending Tri-State/DMEA contracts). These contracts include agreements governing the rate credits Tri-State provides DMEA for electricity generated through a hydro-power project; a telecom sharing agreement; a facilities management agreement; and a substation license agreement.

DMEA's suggestion that the Commission need only regulate a single WESC buyout number (Compl. ¶ 48) is plainly wrong. If the Commission exercises jurisdiction over DMEA's Complaint, it must not only nullify Section 3(a) and the Board's discretion to allow or deny DMEA's withdrawal, it must also adjudicate DMEA's claim that Tri-State has breached the bylaws by failing to provide equitable terms and conditions for DMEA's withdrawal. The Commission would also be required to force the renegotiation or continued performance of the various other Tri-State/DMEA contracts. There is no authority for the Commission to do any of these things under the Colorado Constitution, relevant statutes, or regulations.

2. Equitable Terms and Conditions for a Member's Withdrawal Do Not Necessarily Include a Contract Buyout.

If the Board in the exercise of its discretion does grant a Member's withdrawal request, Section 3(a) requires the departing Member to comply "with such equitable terms and conditions as the Board of Directors may prescribe . . . ." Nothing in the bylaws requires that such equitable terms and conditions include a buyout of the Member's WESC, and the bylaws make no mention of a WESC "exit charge."

"Equitable terms and conditions" may include a Member withdrawing from membership and not paying a contract buyout amount. *See, e.g.,* Sheridan-Johnson discussion, *supra* at 10-11. Kit Carson is the only Member to have withdrawn and paid a liquidated amount to discharge its WESC. Contrary to DMEA's claim of a right to a contract buyout amount, Tri-State's history shows a consistent pattern of Members meeting, and in some cases being forced to meet, their contractual commitments to Tri-State and the other Members.

3. Whether to Allow a Member to Withdraw is within the Board's Discretion, and Involves Considerations Unrelated to the Amount of a WESC buyout.

Section 3(a) exists for the benefit of all Members and specifically those that remain after a withdrawing Member's departure. If the Member departs on terms that are not "equitable" as determined by the Board, the remaining members do not receive the benefit of the bargain that the bylaws represent. The Members joined Tri-State and each made long-term commitments to Tri-State and to each other, all in reliance on the other Members living up to their promises as set forth in the bylaws and the WESCs.

In *Jay County*, a rural distribution cooperative argued that a cooperative member may resign its membership from the G&T at any time, thereby making improper a grant of specific performance requiring it to continue purchasing power under its WESC. 692 N.E.2d at 914. The court had little difficultly rejecting the efforts by "a member of a cooperative which has specifically agreed to a contractual interrelationship with other members of the cooperative, to 'resign at any time' and ignore obligations and commitments previously made." *Id.* at 914.

Like the distribution cooperative in *Jay County*, DMEA voluntarily joined Tri-State and agreed to certain contractual obligations to Tri-State and the other Members. Tri-State's other Members entered into the Tri-State system, agreed to the bylaws, executed their own WESCs, and approved Tri-State's long-term financial commitments in reliance upon similar promises by DMEA and the other Members. The Board owes equal duties to all Tri-State Members, including those who remain in the Tri-State system and honor their contractual commitments. DMEA's elevation of its individual interests over those of its fellow Members, including those situated outside of Colorado, and the PUC's regulatory authority, should be rejected.

D. DMEA's Complaint is the Latest in a Series of Unsuccessful Attempts to Evade a Cooperative's WESC.

DMEA's opportunistic attempt to "take advantage of declining wholesale costs" (Compl. ¶ 7) is the most recent attempt by a rural electric distribution cooperative to evade its WESC, thereby shifting the G&T's costs to fellow members. Faced with such an attempt over 30 years ago, the Court of Appeals for the Seventh Circuit described the history as follows:

> This dispute is apparently but one variation of the periodic conflicts occurring between co-op customers and their electricity suppliers. When Congress enacted the REA in 1936, ninety percent of rural residents were without electric power. The REA … provided the loan capital for the construction of facilities, the extension of lines, and the generation and transmission of power in sparsely populated areas…. Now that the rural electric systems are almost universally in place, but not paid for, some co-op customers are disgruntled with their rates, which necessarily reflect the amortization cost of the system.
>
> Consequently, distribution co-ops have tried to sell their assets to neighboring investor-owned utilities, [*Tri-State v. Shoshone I*, 805 F.2d 351], or to void their long-term contracts with co-op suppliers whose rates are higher than neighboring utilities. *United States v. Southwestern Electric Coop.*, 663 F. Supp. 538 (S. D. Ill. 1987). The

> withdrawal of any distribution co-op from the system necessarily shifts the fixed costs of the electricity (represented by the debt service) to the other members of its [G & T] and raises the possibility of default, with potentially disastrous results for the system. *See* [*Tri-State v. Shoshone I*], 805 F.2d at 357. It is clear that somebody will have to retire the debt of the rural electrification system; if co-op customers like plaintiffs succeed in removing themselves from the REA structure in large enough numbers to precipitate default, the costs may eventually be shifted to federal taxpayers.

Fuchs, 858 F.2d at 1212 n.8 (citations and quotations omitted); *see also McCone Elec. Co-op,* 484 P.2d 747 ("Ten years after the wholesale power contract, initiated and inspired, we are told, by defendant McCone, defendant McCone now wants a better deal elsewhere. It is as simple as that.").

Federal and state courts have consistently and repeatedly rejected the "creative" legal arguments of cooperatives such as DMEA who seek to be relieved of their WESC obligations. *See, e.g., United States v. Southwestern Elec. Co-op., Inc.*, 869 F.2d 310, 314 (7th Cir. 1989) (distribution cooperative's "erroneous prediction or judgment as to events to occur in the future" does not justify WESC rescission); *Shoshone II*, 874 F.2d at 1355-62 (rejecting a Tri-State Member's attempt to evade its WESC by selling its assets to an investor-owned utility); *Jay County*, 692 N.E.2d at 911-14 (affirming trial court's rejection of mutual mistake and other arguments and requiring distribution cooperative to continue purchasing power under its WESC); *United States v. Coosa Valley Elec. Coop., Inc.*, No. 95-C-0515S, 1986 U.S. Dist. LEXIS 29658 (N.D. Ala. Feb. 4, 1986), at *18-22 (rejecting arguments that WESC was unenforceable due to fraud, duress, mistake, frustration of purpose, and failure of consideration); *Chimney Rock,* 2014 WL 1583993 (dismissing eight different legal claims, including breach of contract claim arising under Section 3(a)).

DMEA's Complaint is the latest iteration in a long line of cases in which a distribution cooperative seeks to rid itself from the financial inconvenience of promises it made knowingly and voluntarily. The Commission should dispose of it in the same manner as the courts: dismissal of the Complaint.

II. The Commission Lacks Jurisdiction Because This Dispute Is Outside Its Statutory "Rate" Jurisdiction.

DMEA's Complaint should also be dismissed because the terms and conditions of DMEA's proposed withdrawal from Tri-State do not constitute a "rate" or a "contract affecting rates" within the Commission's jurisdiction.

A. The Authorities DMEA Relies on to Invoke Commission Jurisdiction Are Predicated on a Dispute Involving a Rate, Contract Affecting Rates, or Other Such Items Within the Commission's "Rate" Jurisdiction.

DMEA cites various Colorado statutes to invoke Commission jurisdiction, including §§ 40-3-101, 40-3-102, 40-3-111(1), and § 40-3-111(2)(a), C.R.S. (Compl., ¶¶ 52, 61.) These statutes authorize the Commission to regulate a "rate" or similar class of charge, such as a "**fare, product, or commodity furnished** or to be furnished or any service rendered or to be rendered" (§ 40-3-101); "**charges, and tariffs**" (§ 40-3-102); "**tolls, fares, rentals, charges, or classifications demanded, observed, charged**, or collected by any public utility **for any service, product, or commodity"** (§ 40-3-111(1)); or a "**fare, toll, rental, charge, classification, rule, contract, or practice** . . . of any public utility" (§ 40-3-111(2)(a)) Each statute pertains to the Commission's jurisdiction with regard to rates charged for commodities or services rendered.

With respect to the Commission's specific authority to hear complaints, the statutes DMEA cites likewise grant jurisdiction only over disputes involving the reasonableness of "rates" and the like. Section 40-6-108(1)(b), C.R.S., under which DMEA claims the Commission has jurisdiction, sets requirements for complaints "as to the reasonableness of **any rates or charges** of any . . . electric . . . public utility." Section 40-6-111(4)(a), C.R.S., also cited by DMEA, requires that "upon complaint . . . the commission shall determine whether the **rate, charge, rule, or regulation in question** is contrary to this section . . . ."

Absent falling within one of these enumerated types of charges,[17] the statutes cited by DMEA do not give the Commission jurisdiction. As explained below, the bylaws' withdrawal provisions and DMEA's potential buyout of its WESC do not fall within the types of charges described in the statutes.

B. Neither Section 3(a) nor the Amount Required to Satisfy DMEA's Contractual Obligations to Tri-State Is a Rate or Charge Within the Commission's Jurisdiction.

As a prerequisite to withdrawal, the bylaws require DMEA to satisfy all of its contractual obligations to Tri-State, including its obligations under the DMEA WESC. One way for DMEA to meet its WESC obligations is to pay Tri-State an amount of money that will compensate Tri-State and the other Members for the revenues Tri-State would otherwise receive from DMEA during the remaining 22-year contract term.

[17] Although DMEA argues that the buyout of its WESC is such a charge, it does not specify in its Complaint which of the enumerated types it believes applies; instead, it simply recites the entire list. (Compl. ¶¶ 53, 62.)

DMEA incorrectly refers to its duty to fulfill its contractual obligations to Tri-State as an "exit charge." It then seeks to invoke the Commission's jurisdiction by characterizing the contractual obligation as a "charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll." (Compl. ¶¶ 53, 62.) Regardless of DMEA's characterization, its contractual obligation to Tri-State and the 42 other Members is something the Commission lacks jurisdiction to erase.

Article XXV of the Colorado Constitution provides the Commission with "all power to regulate the facilities, service and rates and charges" of every Colorado public utility. As the Colorado Supreme Court has explained, "[t]he primary purpose of the [Commission] is to ensure that the rates charged are not excessive or unjustly discriminatory. The PUC protects the right of consumers to pay a rate that accurately reflects the cost of service rendered, and has a general responsibility to protect the public interest regarding utility rates." *Colorado Office of Consumer Council v. Publ. Serv. Co. of Colo.*, 877 P.2d 867, 872 (Colo. 1994) (internal citations omitted) (emphasis added). The relief DMEA requests here—the nullification of the bylaws' withdrawal provisions and the compelled renegotiation and extinguishment of the DMEA WESC, with the Commission determining the price DMEA must pay to be relieved of 22 additional years of purchase obligations—does not pertain to the cost of services rendered and, therefore, is not a rate or charge within the Commission's jurisdiction.

This conclusion is supported by the plain language of the Colorado Public Utilities Law. The Commission's authority to regulate utility rates and charges is set forth in Article 3, Title 40. The predicate statute that serves as the basis for the

remainder of the Article provides that "[a]ll charges made, demanded or received by any public utility for any rate, fare, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable." § 40-3-101(1), C.R.S. An amount DMEA must pay to avoid its future wholesale purchase obligations is not "for any rate, fare, product or commodity furnished or to be furnished or any service rendered or to be rendered." Nothing is being furnished or rendered to DMEA as a result of its withdrawal from membership. The amount DMEA must pay to avoid its remaining 22-year promise is simply not a rate or charge associated with the facilities and services of a public utility such that it falls within the Commission's constitutional and statutory authority.

The typical instances where the Commission exercises its rate jurisdiction demonstrate the difference between the contractual obligation at issue here and the types of rates and charges the Commission regulates. Ratemaking usually occurs when a utility (or interested party) seeks to increase (or decrease) its filed rates because its costs, including return on invested capital, are asserted to be too high (or too low). *See* Proceeding No. 17AL-0429G, Decision No. R18-0014 ¶¶ 38-43 (describing extent of Commission's ratemaking authority).

This authority is generally carried out either in relation to new rates that are proposed by a utility or in relation to rates that a utility already has on file with the Commission. *See, e.g.,* Proceeding No. 17AL-0649E, Decision No. C18-0280 ¶¶ 62-64 (Apr. 26, 2018) (describing ratemaking process where a utility files an advice letter proposing new rates); Proceeding No. 10F-011G, Decision No. C10-0029 (complaint alleging that rates on file were unjust and unreasonable in light of recent

utility earnings). Once the Commission sets new rates, those rates remain on file and must be charged for the service in question. *See* Decision No. C18-0280 at ¶¶ 62-67.

The relief DMEA requests here is categorically different because it asks that the Commission adjudicate a dispute concerning Section 3(a), a private contract between Tri-State and its various Members. There is no filed "rate" at which DMEA is entitled to be released from its WESC. Nor could such a "rate" be put on file and charged to future Members seeking to withdraw under Section 3(a) because a Member has no absolute right of withdrawal, and calculations for WESC buyout are complex and fact-specific.

The present dispute stands in contrast to the 2013 Tri-State rate complaint (Proceeding No. 13F-0145E) in which three Members protested Tri-State's new wholesale rate. Unlike the present situation, the wholesale rate at issue in 2013 was a "rate" in the traditional sense in that it was applicable and charged to each Member.[18] Decision No. C14-0006-I ¶¶ 4-7.

Further illustrating that the relief DMEA requests is far outside normal Commission practice is the fact that the Commission has never decided to set the *amount* of Tri-State's rates. In 2013, for example, the Commission only went as far as to ask whether the structure of Tri-State's wholesale rate was permissible under Colorado law. Decision No. C14-0006-I, ¶ 58. The Commission specifically

[18] Tri-State did not then, and does not now, agree that its wholesale rate charged to its Members falls within the Commission's jurisdiction. Nevertheless, Tri-State does agree that the rate at issue previously was at least a "rate" in the traditional meaning of that term.

observed it would not determine the amount of Tri-State's wholesale rate. *Id.* at ¶¶ 54-58.

C. Neither Section 3(a) nor the Amount DMEA Must Pay to Terminate Its WESC Is a "Contract Affecting Rates".

The amount required to satisfy DMEA's obligations to Tri-State arises under Tri-State's bylaws. The bylaws are a contract affecting Tri-State's governance and the provision at issue concerns Member withdrawals. As such, neither the bylaws nor the specific provision at issue are a "contract affecting rates."

The Legislature has empowered the Commission to regulate "contracts *affecting* . . . rates, fares, tolls, rentals, charges, or classifications." § 40-3-111(1), C.R.S. (emphasis added). That power does not extend to *all* contracts entered into by a public utility — only those *affecting* rates. *See Dep't of Transp. v. Stapleton*, 97 P.3d 938, 943 (Colo. 2004)(legislature does not use language idly). This is consistent with the Colorado Supreme Court's explicit statement that the Commission is not a court. *People v. Swena,* 296 P. at 272.

The conclusion that the bylaws' withdrawal provision is not a "contract affecting rates" is demonstrated by its potential application, which will depend upon the Tri-State Board's decision. First, DMEA might withdraw from membership while still honoring its WESC and paying the same rates that it does currently. (*See supra* at 13). In that event, there is no rate affected by the Board's decision because DMEA will continue to pay the same wholesale rate it would have paid had it remained a Member. This demonstrates that Section 3(a) is intended to ensure that the withdrawal of a Member does not affect the rates of the non-withdrawing Members.

Alternatively, DMEA might withdraw from Tri-State and pay an amount to satisfy its contractual obligations to Tri-State. In that case DMEA will no longer pay Tri-State's wholesale rate; therefore, to the extent that DMEA seeks to tie the bylaw withdrawal provisions to Tri-State's wholesale rate, its argument fails because DMEA will no longer be subject to Tri-State's wholesale rate.[19] To the extent DMEA's exit has some indirect impact on the rate paid by Tri-State's other Members, that is not sufficient grounds for jurisdiction because Tri-State's other Colorado Members have exempted themselves from Commission rate regulation and Tri-State's non-Colorado Members are clearly not subject to Commission rate regulation.

Finally, to the extent DMEA claims that its own rates (*i.e.,* the retail rates DMEA charges to its own member-consumers) will be "affected" by the amount it may pay to satisfy its contractual obligations to Tri-State, DMEA's retail rates are not regulated because DMEA has voted to exempt itself from Commission rate regulation. There is no link between Tri-State's bylaws provision governing withdrawal and any effect on rates paid by DMEA or otherwise regulated by the Commission.

The notion that Section 3(a) of the bylaws is somehow a contract "affecting" rates is also at odds with Commission practice. Jurisdiction under § 40-3-111(1),

[19] Unlike the dispute in Proceeding No. 13F-0145E which focused on the rate paid for wholesale electric service, the present dispute focuses on DMEA's desire to withdraw from Tri-State and, separately, buy out of its WESC obligations on favorable terms. The Complaint admits as much when it states that DMEA's "request does not require . . . changing any rate Tri-State currently charges its members . . ." (Compl., ¶ 48.) Any potential impact on Tri-State's rates would occur only if the Commission inserted itself into this dispute under Tri-State's bylaws and set a buy-out amount that required Tri-State's other Members to absorb the excess costs of DMEA's exit. Such an attenuated and contingent result does not convert the bylaws' withdraw provision into a "contract affecting rates" within the Commission's jurisdiction.

C.R.S. is generally exercised in one of two ways: (1) reviewing the reasonableness of costs incurred under an existing contract in a subsequent rate case, or (2) reviewing the prudency of a contract before it takes effect. For example, the Commission has jurisdiction to review contracts whose costs must be recovered through rates, such as power purchase agreements, fuel supply contracts, and hedging arrangements. In general, the Commission does so by reviewing their prudence in the context of a subsequent rate case. *See, e.g.,* Proceeding No. 13A-0836E, Decision No. C16-0290. For other contracts, the Commission reviews their reasonableness before they take effect. *See, e.g.,* Docket No. 11A-833E, Decision No. C12-1107; Docket No. 11A-689E, Decision No. C11-1291 (reviewing contract on a prospective basis). Decision No. C16-0290.

The review DMEA requests here is very different from the Commission's exercise of jurisdiction under § 40-3-111(1), C.R.S. There is no opportunity for the Commission to consider the costs of a particular Tri-State contract and allow or disallow recovery of the costs incurred thereunder. Also, there is no opportunity here for the Commission to review the complained of contract before it takes effect. DMEA has had a WESC with Tri-State, and has been a party to Tri-State's bylaws, for over 25 years.

The bylaws provision at issue is a governance matter related to Member withdrawal. The bylaws provision does not pertain to rates, and is well beyond the types of contracts that are usually subject to Commission review under § 40-3-111(1). For these reasons, Tri-State's bylaws are not a "contract affecting rates" as that term is used with respect to the Commission's statutory powers.

D. Even If Tri-State's Bylaws Were a Contract Affecting Rates Within the Commission's Jurisdiction, the Commission May Not Exercise Jurisdiction to Relieve DMEA of Its Voluntary Agreement.

Even if it considers Tri-State's bylaws to be a "contract affecting rates," the Commission should not exercise jurisdiction here to disrupt contractual obligations freely and voluntarily undertaken by DMEA. "[T]here is, quite clearly, no principle which imposes an obligation [on the Commission] to . . . relieve a contracting party from the burdens of an improvident undertaking." *Colorado Power Co. v. Halderman*, 295 F. 178, 195 (D. Colo. 1924) (emphasis added) (quoting *Arkansas Nat. Gas Co. v. Arkansas R. R. Comm'n*, 261 U.S. 379, 383 (1923)). "The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be." *Id.* (emphasis added).

Like the courts, which have consistently thwarted attempts by distribution cooperatives to evade their WESCs,[20] federal courts take a similar approach in the context of long-term energy supply contracts entered into by FERC-regulated utilities. These cases are especially relevant here, because FERC's regulatory mandate is quite similar to that of the Commission. Congress has granted jurisdiction to FERC to ensure that:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

[20] *See* discussion *supra* at pp. 22-24.

16 U.S.C. § 824d(a); *cf.* § 40-3-111(1), C.R.S.

Interpreting this mandate in the context of wholesale power contracts, the U.S. Supreme Court has held that FERC must presume that the electricity rate set in a freely negotiated wholesale energy contract meets the "just and reasonable" requirement of the Federal Power Act, and the presumption may be overcome only because of "unequivocal public necessity" or other "extraordinary circumstances." *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.,* 554 U.S. 527, 530, 550-51 (2008).

This presumption is compelled by the underlying economics of long-term energy contracts. "Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce." *Id.,* 554 U.S. at 547. Allowing "parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed . . . would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly undermines the role of contracts in the [Federal Power Act's] statutory scheme." *Id.*

While Tri-State's bylaws and DMEA's WESC do not directly set a "rate", similar logic applies if the Commission considers them to constitute either a "rate" or a "contract affecting rates." DMEA, which for two decades has enjoyed favorable wholesale power prices and a reliable and stable supply of wholesale power, should not at this late date be permitted to escape its WESC now that the market price has fallen. Therefore, if the Commission chooses to treat DMEA's Complaint as falling within the scope of § 40-3-111(1), C.R.S., it should nevertheless decline to

intervene. The Commission has no duty to vary or set aside bilateral contracts that were freely entered into by sophisticated commercial entities. Like the federal courts, the Commission should presume such contracts to be just, reasonable and enforceable according to their terms.

E. Even If the Bylaws Were a Rate or Contract Affecting Rates, the Commission Lacks Jurisdiction Because It Does Not Regulate Tri-State's Rates.

DMEA's Complaint asks the Commission to insert itself into the interpretation and application of bylaws that govern not only Tri-State's relationship with DMEA, but also the relationship between every one of the 43 Members – most of which are located outside Colorado. *Fuchs*, 858 F.2d at 1212-13 n.8; *Shoshone I*, 805 F.2d at 357; *Jay County*, 692 N.E.2d at 913-14. If the Commission believes it has jurisdiction over this withdrawal dispute, it will have determined that jurisdiction arises from its authority over rates, tariffs or charges, or contracts affecting a rate, tariff or charge, and the Commission will effectively have decided that that the so-called "exit charge" is a Tri-State rate. On a consistent basis, the Commission has declined to regulate Tri-State's rates.

The Commission has long recognized the limitations on its jurisdiction over Tri-State's generation and transmission business. *See, e.g.*, Application No. 28091, Decision No. 86499 (Commission lacks authority to approve or reject Tri-State's securities);[21] Docket No. 99A-196E, Decision No. R99-891[22] (Commission lacks authority over Tri-State's proposed merger with Plains Electric G&T); Docket No.

[21] **Attachment I**.

[22] **Attachment J**.

02R-137E, Decision No. C02-793[23] (Commission lacks authority to regulate Tri-State's rates); Docket No. 05M-375E, Decision No. C06-0657 (same); Docket No. 07M-445E (same).

Most recently, in rejecting portions of the ALJ's Recommended Decision in Proceeding No. 13F-0145E, the Commission noted that the complainants' requested relief related to cost allocation and rate design "infringe upon our longstanding practice of declining to engage in general rate regulation of Tri-State." Decision No. C14-0006-I, ¶ 53. Affirming the importance of the more than 60 years of precedent in which it has specifically declined to regulate Tri-State's rates, the Commission noted:

> The precedent cited by Tri-State in its filings and in the Interim Decision reflects the judgment of the Commission not to interfere with the detailed rate making process in which Tri-State engages. It recognizes that full rate regulation would require a comprehensive rate case, necessitating the establishment of a Colorado-specific rate base and revenue requirements for Tri-State that would interfere with its operations. For the Commission to undertake a partial or full rate case would be a significant, and not mostly incidental, departure from the Commission's previous decisions that the PUC does not regulate Tri-State's rates.

Id., ¶ 54.[24]

The Commission's reasoning in Proceeding No. 13F-0145E applies equally here. The Commission's exercise of jurisdiction here will arise if it accepts DMEA's claim that the amount required to fulfill its contractual obligations to Tri-State is a "rate" or "charge" subject to Commission regulation. Such regulation would require

[23] **Attachment K**.

[24] The long history of court decisions and Commission precedent concerning limitations on the Commission's jurisdiction over Tri-State is discussed in detail at pages 24-32 of Tri-State's Motion to Dismiss in Proceeding No. 13F-0145E, which is attached as **Attachment L**.

consideration of the very issues the Commission has previously declined to consider. Contrary to DMEA's suggestion that the Commission need not undertake anything like a rate case to address DMEA's claims (Compl. at 10, n.22), the Commission would be required to consider, among many other factors, long-term investments made on behalf of DMEA and Tri-State's other Members; the debt incurred to finance such investments and the extent to which Commission action could trigger loan covenant defaults; the revenue requirement associated with debt service related to such investments; current and future wholesale power prices and market conditions related to the power that would otherwise have been sold to DMEA; and resulting cost shifts to Tri-State's other Members both within and outside of Colorado. The issues the Commission must consider in connection with DMEA's requested relief are the same as, and in some respects more complicated than, those that it would have been required to consider but declined to do so in Proceeding No. 13F-0145E.

While such rate-related issues argue strongly against the exercise of jurisdiction, the Commission previously articulated an even more important basis for its forbearance here. Again referring to the decades of Commission decisions in which it did not assert jurisdiction over Tri-State's rates, the Commission stated, "[t]his precedent also acknowledges the cooperative model of governance that has served its members since Tri-State's inception, and that the Commission should not be a forum to resolve particularized rate disputes among Tri-State's cooperative members." *Id.*, ¶ 55 (emphasis added).

As discussed above, this dispute does not pertain to a rate but rather a contractual commitment from DMEA to Tri-State and, in effect, to every other Tri-State Member. The bylaws, the rights and obligations of all 43 Tri-State Members thereunder, and the Board's authority to implement and enforce them are at the very heart of "the cooperative model of governance that has served its members since Tri-State's inception." Decision No. C14-0006-I at ¶ 55. Furthermore, DMEA's attempt to enlist the Commission in circumventing Tri-State's bylaws is the epitome of a particularized dispute the Commission should decline to consider.

III. DMEA Has Failed to State a Claim Regarding Discriminatory or Preferential Rates.

A. Legal Standard.

A public utility may not establish or maintain any unreasonable difference as to rates, charges, service, facilities, or between localities or class of service. § 40-3-106(1)(a), C.R.S.[25] Unreasonable discrimination includes charging different rates to similar classes of customers based on their income or based on where they live, and the Supreme Court has found illegal discrimination only where the Commission has issued an order in which "one group of customers was charged a higher rate, thereby creating a subsidy for another group of customers." *Integrated Network Servs., Inc. v. Pub. Utilities Comm'n of State of Colo.*, 875 P.2d 1373, 1384 (Colo. 1994); *Mountain States Legal Found. v. Pub. Utilities Comm'n*, 197 Colo. 56, 59–60 (1979).

[25] DMEA also cites § 40-3-111(4)(a), C.R.S. as grounds for its claim regarding discriminatory rates. (Compl. ¶¶ 60, 61.) Subsection (4)(a), however, does not exist in § 40-3-111, C.R.S.

While unreasonable differences are impermissible, reasonable differences between different customer classes are permitted. *Id.* at 1383. A difference in rates is not necessarily unreasonable just because the cost to serve two customer classes is the same. *Id.* ("There is no support . . . for the proposition that similar costs of service dictate similar rates.")

B. There Cannot Be Unreasonable Discrimination as to Rates Where There Is No Rate.

As explained above,[26] there is no "rate" here over which the Commission has jurisdiction. Because no "rate" is at issue here, there cannot be an "unreasonable difference as to rates" under § 40-3-106(1)(a), C.R.S.

C. Even If There Was a Rate, There Is No Unreasonable Discrimination Because DMEA and Kit Carson Are Not Similarly Situated.

Even if the Commission considers this bylaw dispute to constitute a "rate," there can be no impermissible discrimination because DMEA and Kit Carson are not similarly situated. The discrimination statute prohibits *unreasonable* differences as to rates between different customers. Here, there are substantial differences that justify the difference between the amount Kit Carson paid to fulfill its contractual obligation to Tri-State and the amount that Tri-State has discussed with DMEA to discharge DMEA's contractual obligations.

The Kit Carson withdrawal process began in 2014 and was completed in 2016. (Compl. Attach. J at 5.) The amount a withdrawing Member should pay to extinguish its WESC is highly sensitive to the date of the withdrawal and the remaining WESC term. Assumptions regarding future wholesale power market

[26] *See supra* at 16-32.

prices, Tri-State's future Member wholesale rates, the departing Member's load forecast, regulatory conditions such as the Clean Power Plan, and other factors are also relevant, and they change over time. Indeed, calculating the amount a departing Member must pay to make the remaining Members whole is necessarily a "one-off" exercise as of a particular point in time. Kit Carson's withdrawal was *sui generis*, as is DMEA's proposed withdrawal.

Because each Member withdrawal (actual or proposed) is unique, it cannot form the basis of a valid discrimination claim by another Member who later seeks to withdraw. Curiously, DMEA's Complaint mentions only Kit Carson's departure; it fails even to mention the departures and attempted departures of Shoshone, Sheridan-Johnson, and the NPSIG Members. DMEA apparently perceives no discrimination problem if—as it hopes—its own withdrawal terms are <u>unlike</u> those provided to Shoshone (forced to pay millions of dollars in breach of contract damages), Sheridan-Johnson (through Basin, paid Tri-State *exactly* what would have been paid under its WESC through the remaining term), or the NPSIG Members (whose collective $220 million-plus buyout amount was found to be equitable by a federal court jury). Clearly, DMEA either realizes that every Member withdrawal is different and therefore not discriminatory, or DMEA seeks a discriminatory "rate" of its own. Either way, DMEA's discrimination claim is not asserted in good faith and must be rejected.

Further, Kit Carson is located in New Mexico, while DMEA is located in Colorado. This not only makes them differently situated, but it also shows that the Commission should not entertain a "discrimination" claim here. While DMEA glosses

over the fact that Kit Carson operated entirely outside Colorado, it would be unprecedented for the Commission to determine that Tri-State has unlawfully discriminated as between its Colorado Members, versus Members in Nebraska, New Mexico and Wyoming.

Finally, DMEA has not identified any subsidy that is created with respect to its alleged different treatment. In *Mountain States*, the Supreme Court found that a preferential gas rate for low-income elderly and low-income disabled persons was impermissible because it was subsidized by higher rates to all other customers. 197 Colo. at 59. Here, DMEA asserts that the amount it must pay to terminate its WESC is too high, but does not identify any "rate" class that has been subsidized by the alleged discrimination.

Ultimately, because Kit Carson and DMEA are not similarly situated and because there is no rate subsidy occurring between them, DMEA's claim regarding discrimination cannot confer jurisdiction.

IV. DMEA Lacks Standing.

DMEA alleges that it has standing to bring its claims based upon Colorado Revised Statutes § 40-6-108(1)(b) (the "Complaint Statute")[27] and § 40-6-111(4)(a) (the "Hearing Statute").[28] (Compl. ¶¶ 57, 58, 67, and 68.) DMEA's allegations of standing, however, are inconsistent with the plain language of these statutes. Therefore, DMEA lacks standing and both of its claims must be dismissed.

[27] § 40-6-108, C.R.S. is entitled "Complaints—service—notice of hearing."

[28] § 40-6-111, C.R.S. is entitled "Hearing on schedules—suspension—new rates—rejection of tariffs."

A. DMEA Does Not Have Standing Under the Hearing Statute as Tri-State Is Not a "Cooperative Electric Association."

Tri-State is a non-profit generation and transmission electric corporation. Its Colorado Members are cooperative electric associations. The statutes clearly distinguish between the two. These entities are separately identified as "public utilities" in § 40-1-103(2)(a). Cooperative electric associations may exempt themselves from Commission regulation by an affirmative vote of their members and consumers. Nonprofit generation and transmission electric corporations and associations may not do so. *See* § 40-9.5-102, C.R.S.[29]

Similarly, the Commission's own rules and regulations distinguish between "cooperative electric associations which have voted to exempt themselves from the Public Utilities Law pursuant to § 40-9.5-103," and cooperative electric generation and transmission associations. Compare Commission Rules 3000(b) and 3000(c).

Accordingly, DMEA may not rely on the Hearing Statute to bring a complaint against a nonprofit generation and transmission electric corporation or association such as Tri-State, or to reduce the Complaint Statute's signature requirement.[30]

[29] Other statutes also distinguish between cooperative electric associations such as DMEA and nonprofit generation and transmission electric corporations and associations such as Tri-State. *See, e.g.*, § 40-2-124(1)(c)(V) and (V.5), C.R.S. (renewable energy standard applicable to cooperative electric associations) as compared to § 40-2-124(8), C.R.S. (renewable energy standard applicable to wholesale utilities providing wholesale electric service to cooperative electric associations that are its members)

[30] The Commission did not specifically address whether Tri-State is a "cooperative electric association" when it reviewed the ALJ's Recommended Decision in its Interim Decision Granting in Part and Denying in Part Respondent Tri-State Generation and Transmission Association's Motion Contesting Interim Decision No. R13-1119-I. *See* Decision No. C14-0006-I.

B. DMEA Cannot Rely on Its Alleged Representative Capacity and, Therefore, It Does Not Have Standing Under the Complaint Statute.

DMEA's Complaint is not signed by any Tri-State customers, let alone the required 25 customers. Accordingly, the Complaint fails to satisfy the plain language of the Complaint Statute and must be dismissed.

The Commission has previously rejected the argument that a complainant can satisfy § 40-6-108(1)(b), C.R.S. on its customers' behalf. In *AM Gas Transfer Corp.*, AM Gas filed a complaint and supplied therewith letters of agency authorizing it to act on behalf of its customers, which it argued complied with the requirements of § 40-6-108(1)(b), C.R.S. *See* Docket No. 01F-343G, Decision No. R01-0971.[31] The Commission rejected this argument and, finding that it lacked jurisdiction, explained that:

> The . . . statute concerning a complaint challenging the reasonableness of a rate or charge of a public utility . . . requires the signature of 25 individual customers unless the complaint is signed by a legislative body, or local official or this Commission. This requirement is mandatory. The Commission cannot waive a mandatory requirement of a State statute. . . .

Id. at 7-8 (emphasis added).

The Commission has been clear, a complainant cannot satisfy the signature requirement by claiming to act on behalf of others, and this requirement is mandatory and non-waivable. DMEA has failed to satisfy the requirements of the Complaint Statute on which it relies for standing and, therefore, its Complaint must be dismissed.[32]

[31] The Recommended Decision became the Commission's final decision by operation of law.

[32] The Commission faced a similar situation in two dockets applying an analogous statute with the same 25 signature requirement. In Docket No. 11F-758E, ALJ Mana Jennings-Fader applied the plain meaning of the § 40-9.5-106(3) C.R.S. and found that the complaint lacked the required 25

DMEA bears the burden of proving that it has standing to assert the claims set forth in the Complaint. Since the Hearing Statute is not applicable to nonprofit generation and transmission electric corporations and associations such as Tri-State, and since DMEA failed to meet the signature requirements of the Complaint Statute, DMEA has failed to meet its burden with regard to injury to a legally protected interest under these statutes. Accordingly, the Commission must apply the plain language of the statute and dismiss the Complaint for failure to satisfy the statutory minimum number of required signatures which deprives the Commission of subject matter jurisdiction in this proceeding.

V. The United States Constitution Deprives the Commission of Jurisdiction.

A. The Commerce Clause Deprives the Commission of Jurisdiction.

The Commission does not have jurisdiction over DMEA's Complaint because the Commission's exercise of jurisdiction would impermissibly burden interstate commerce in violation of the Commerce Clause of the United States Constitution. As this Commission has long recognized, Tri-State is engaged in interstate commerce. *See, e.g.*, Decision No. 86499, dated March 18, 1975 (Attachment I). The Commission's regulation of an "exit charge" for DMEA necessarily interferes with Tri-State's conduct of interstate commerce. Tri-State will be forced to account for any WESC buyout number set by the Commission in its dealings with its 25

signatures and, therefore, the Commission lacked subject matter jurisdiction. *See* Decision No. R11-1204, ¶¶ 39-46. The ALJ's Recommended Decision became the Commission's final decision by operation of law. Similarly, in Docket No. 13F-0125E, ALJ Paul Gomez applied the plain meaning of the same statute and, having found that the complainant had provided only 19 valid signatures, concluded that, "Because the Complaint is defective and has failed to provide the requisite number of signatures pursuant to § 40-9.5-106(3), the Commission does not possess subject matter jurisdiction in this proceeding." Decision No. R13-0378, ¶¶ 10-18. Accordingly, ALJ Gomez recommended that the complaint be dismissed, and that recommendation was affirmed by the Commission. Decision No. C13-0555, ¶ 11.

Members located outside of Colorado. The interrelatedness of the Tri-State system, *see supra* at 5-6, renders it impossible for the Commission to isolate the effects of any regulation of DMEA's withdrawal and WESC termination to intrastate commerce.

In Proceeding No. 13F-0145E, Tri-State argued, *inter alia*, the PUC's regulation of Tri-State's wholesale rates would violate the Commerce Clause. *See* **Attachment L**, 2013 Motion to Dismiss at 13-24. Tri-State noted that it operated entirely in interstate commerce and regulation of Tri-State would impermissibly constitute Commission regulation of interstate commerce. *Id.* Tri-State argued that both under the *per se* standard and *Pike* balancing tests applicable to Commerce Clause jurisprudence the Commission's regulation would be in violation of the U.S. Constitution. *Id.* Tri-State further argued that the Commission's historical decisions not to regulate Tri-State's rates acknowledged the fact Tri-State operated in interstate commerce and that Commission regulation would interfere with that interstate commerce in an impermissible manner. *Id.* at 24-29 (citing Decision No. 86499; Decision No. R99-891; Decision No. C99-1285; Decision No. C02-793; Decision No. C06-0657).

The Commerce Clause argument set forth in the 2013 Motion to Dismiss applies with equal force in this matter. In the interest of promoting efficiency and conserving the Commission and the parties' resources, Tri-State incorporates by reference all argument, briefing, testimony and other factual evidence concerning its Commerce Clause arguments and preserves its challenge to Commission regulation in this matter under the Commerce Clause of the United States Constitution. Tri-State will not repeat those factual and legal arguments here, nor reintroduce the

factual support provided, unless requested to do so by the Commission. Tri-State expressly reserves and does not waive, surrender or compromise any and all claims that the Commission's exercise of jurisdiction and regulation of the instant dispute with DMEA is in violation of the Commerce Clause based on Tri-State's operation in interstate commerce.

B. The Contract Clause Deprives the Commission of Jurisdiction.

The Contracts Clause of the United States Constitution restricts the power of state agencies to disrupt contractual arrangements. It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, §10, cl. 1. The Clause applies to any kind of contract. *Allied Structural Steel Co. v. Spannaus*, 438 U. S. 234, 244–245, n. 16 (1978). To determine when a state law or agency action crosses the constitutional line, courts apply a two-step test. They first ask whether the challenged action has "operated as a substantial impairment of a contractual relationship." *Id.*, 438 U.S. at 244. If so, the question is whether the state has acted in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U. S. 400, 411–412 (1983).

As noted previously, Tri-State's bylaws constitute a contract between and among Tri-State and its 43 members. DMEA's Complaint asks the Commission to ignore Section 3(a) of the bylaws and instead to substitute its own judgment for Tri-State's Board as to whether (a) DMEA should be permitted to withdraw from Tri-State; (b) if so, whether DMEA should be required to honor its purchase obligations through the remaining contract term; and (c) if not, what amount of money DMEA

must pay to Tri-State to extinguish the contract. Suspending the bylaws in such a manner would amount to a clear violation of the Contract Clause. *E.g., Duke Energy Trading and Marketing, LLC v. Davis*, 267 F.3d 1042, 1057 (9th Cir. 2001); *Public Service Company of New Hampshire v. Patch*, 167 F.3d 15, 27-29 (1st Cir. 1998).

CONCLUSION

WHEREFORE, Tri-State respectfully requests that the Commission dismiss the Formal Complaint filed by Delta-Montrose Electric Association and for such other and further relief as the Commission deems appropriate.

Submitted this 15th day of January, 2019.

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